Ali Tan bin Abdullah v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO N-05–159 OF 2011
ABDUL MALIK ISHAK, CLEMENT SKINNER AND AZAHAR MOHAMED JJCA
16 OCTOBER 2012

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Criminal Law — Penal Code — s 302 — Appeal — Appellant charged for murders of his neighbour and her child — No eye witness to crimes — Appellant went into hiding — Appellant pawned valuables belonging to victim — Information led to recovery of victim's handphone sim cards — Whether whole circumstantial evidence sufficient to convict appellant — Whether mere denial could amount to reasonable doubt — Whether charges proved beyond reasonable doubt

D

Criminal Procedure — Standard of proof — Proof beyond reasonable doubt — Whether means proof beyond shadow of doubt — Reasonable doubt which is fanciful or speculative not to be entertained — Whether mere denial could amount to reasonable doubt

E

Evidence — Circumstantial evidence — Standard of proof — Whether proof beyond reasonable doubt — Whether whole circumstantial evidence sufficient to convict appellant for murder

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The appellant was charged under s 302 of the Penal Code for the murders of a woman and her child. The prosecution relied on circumstantial evidence to prove its case against the appellant as there was no eye witness to the crimes. The appellant was the victims' immediate neighbour. The victims were found lying motionless in the bathroom of their apartment with their hands and legs were bound and mouth sealed with masking tape. The appellant had taken flight immediately after the incident and had gone into hiding after staying a night at a hotel. On the following day, the appellant went to a computer repair shop and sought to reformat a Dell laptop. The appellant also had with him three handphones, two adaptors and a Sony PSP. Also on the following day, the appellant went to a pawn shop to pawn several items, namely a necklace, a pendant, two bangles and a pair of earrings. The husband of the deceased woman confirmed that all these items belonged to her. Soon after his arrest, the appellant gave information to one ASP Poi Chong Lai ('PW18') and led PW18 to a spot along a road where he had thrown away three sim cards for the Nokia phones. Two of the sim cards were registered under the deceased woman's

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name. In the course of the trial, the prosecution sought to admit forensic evidence (blood) comprising the presence of the appellant's DNA profile. However this DNA evidence was ruled inadmissible. The appellant in his defence made an unsworn statement from the dock claiming he had entered the victims' apartment and taken the laptop, a PSP, three handphones and the jewelleries. However, he denied murdering the victims. The High Court found the appellant guilty on both charges of murder and sentenced him to death. The appellant appealed against that decision on the ground that there was insufficient evidence to sustain the murder convictions.

Held, dismissing the appeal:

(1) Even without the DNA evidence, there were a number of pieces of evidence that incriminated the appellant in the commission of the offences. Apart from the fact that the appellant went into hiding at Sunshine Hotel, what was more glaring was the evidence that the appellant had pawned the first victim's personal belongings and subsequently, sent the victim's laptop for reformatting. On top of that, was the evidence of the recovery of the first victim's handphone sim cards from a place along the road as a result of the appellant's information. All this admissible circumstantial evidence when taken together, irresistibly and unmistakably led to the conclusion that the appellant committed the gruesome killings (see para 17).

(2) In a case like this where the evidence is wholly circumstantial what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands which go to make a rope. The real question is: is that rope strong enough to hang the prisoner (see para 17); *Idris v Public Prosecutor* [1960] MLJ 296 referred; *Chan Chwen Kong v Public Prosecutor* [1962] MLJ 307 referred.

(3) Evidence pertaining to the recovery of articles belonging to the victim from the accused, soon after the murder of the victim, is undoubtedly one of the circumstances which can be considered by a court in finding that the accused has committed the offence of murder (see para 18); *Krishna Rao a/l Gurumurthi & Anor v Public Prosecutor & another appeal* [2007] 4 CLJ 643 referred.

(4) Proof beyond reasonable doubt is proof that leaves the court firmly convinced of the accused's guilt. However, it is not proof with absolute certainty. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. Even though the benefit of every reasonable doubt must be given to the accused and cannot be withheld from him, court must not, on the other hand, entertain it on grounds which are fanciful or in the nature of speculation. The law does not require proof that overcomes every possible doubt (see para 24); *Public Prosecutor v Saimin & Ors* [1971] 2 MLJ 16 referred; *Sabarudin bin Non & Ors v Public*

Prosecutor [2005] 4 MLJ 37 referred; *Pang Chee Meng v Public Prosecutor* [1992] 1 MLJ 137 referred; *Public Prosecutor v Datuk Haji Harun bin Haji Idris & Ors* [1977] 1 MLJ 180 referred.

(5) Mere denial or presenting a bare story of innocence, such as in the circumstances of the present case, cannot amount to reasonable doubt. The court's acceptance of the explanation offered by an accused person must be based upon reason and common sense, and cannot be illogical or irrational. The existence of reasonable doubt is dependent upon the totality of the evidence and on an examination of all the evidence in a fair and reasonable manner and not in isolation. In the present case, the appellant had failed to cast any reasonable doubt on the prosecution's case and the charges were proved beyond reasonable doubt (see para 25).

[Bahasa Malaysia summary

Perayu dipertuduh di bawah s 302 Kanun Keseksaan kerana membunuh seorang wanita dan anaknya. Pendakwa raya bergantung kepada keterangan persekitaran untuk membuktikan kesnya terhadap perayu memandangkan tiada saksi yang melihat jenayah tersebut. Perayu merupakan jiran terdekat mangsa-mangsa. Mangsa-mangsa ditemui terbaring kaku di dalam tandas apartmen mereka dengan tangan dan kaki mereka diikat dan mulut ditutup dengan pita pelekat. Perayu telah melarikan diri sejurus selepas insiden tersebut dan menyembunyikan diri selepas bermalam di sebuah hotel. Pada keesokan harinya, perayu pergi ke kedai membaiki komputer dan meminta untuk memformat semula sebuah komputer riba Dell. Perayu juga mempunyai tiga telefon bimbit bersamanya, dua penyesuai-penyesuai dan satu Sony PSP. Pada keesokan harinya juga, perayu pergi ke kedai pajak gadai untuk menggadaikan beberapa barang, iaitu seutas kalung, sebuah loket, dua utas gelang dan sepasang anting-anting. Suami kepada wanita yang mati tersebut telah mengesahkan bahawa kesemua barang tersebut adalah kepunyaan isterinya. Selepas penangkapannya, perayu memberikan maklumat kepada ASP Poi Chong Lai ('PW18') dan membawa PW18 kepada satu tempat di sepanjang jalan di mana dia melemparkan tiga kad sim untuk telefon-telefon Nokia tersebut. Dua daripada kad sim didaftarkan di atas nama wanita yang mati tersebut. Semasa perbicaraan berlangsung, pendakwa raya memohon untuk menerima keterangan forensik (darah) yang mengandungi kehadiran profil DNA perayu. Walau bagaimanapun, keterangan DNA ini diputuskan tidak boleh diterima. Perayu dalam pembelaannya membuat kenyataan tidak bersumpah daripada kandang, mendakwa bahawa dia memasuki apartmen mangsa-mangsa dan mengambil komputer riba, satu PSP, tiga telefon bimbit dan barang-barang kemas. Walau bagaimanapun, dia menafikan membunuh mangsa-mangsa. Mahkamah Tinggi mendapati perayu bersalah ke atas kedua-dua pertuduhan membunuh dan menjatuhkan hukuman mati ke

A atasnya. Perayu merayu terhadap keputusan tersebut atas alasan bahawa tidak terdapat alasan mencukupi untuk mengekalkan sabitan membunuh.

Diputuskan, menolak rayuan:

B (1) Walaupun tanpa keterangan DNA, terdapat beberapa bahagian keterangan yang mengaitkan perayu dalam perlakuan kesalahan tersebut. Selain daripada fakta bahawa perayu pergi menyembunyikan diri di Sunshine Hotel, apa yang lebih ketara ialah perayu telah menggadai barangan peribadi milik mangsa pertama dan selepas itu, menghantar C laptop mangsa untuk diformat semula. Lebih-lebih lagi, keterangan penemuan kad sim mangsa pertama daripada satu tempat di sepanjang jalan adalah daripada maklumat perayu. Semua keterangan persekitaran boleh diterima ini, apabila dikumpulkan, secara tidak disangkal dan tanpa silap lagi membawa kepada kesimpulan bahawa perayu telah D melakukan pembunuhan yang kejam (lihat perenggan 17).

(2) Dalam kes seperti ini di mana keterangan bersifat persekitaran sepenuhnya, apa yang perlu dipertimbangkan bukan hanya kekuatan setiap helaian keterangan individu tetapi juga gabungan kekuatan E helaian-helaian ini yang boleh dijadikan seutas tali. Persoalan sebenar ialah: adakah tali tersebut cukup kuat untuk menggantung tahanan (lihat perenggan 17); *Idris v Public Prosecutor* [1960] MLJ 296 dirujuk; *Chan Chwen Kong v Public Prosecutor* [1962] MLJ 307 dirujuk.

F (3) Keterangan mengenai penemuan barang-barang kepunyaan mangsa daripada tertuduh, sejurus selepas pembunuhan mangsa, merupakan satu daripada keadaan-keadaan yang boleh dipertimbangkan oleh mahkamah dalam memutuskan bahawa tertuduh telah melakukan kesalahan membunuh (lihat perenggan 18); *Krishna Rao a/l Gurumurthi & Anor v Public Prosecutor & another appeal* [2007] 4 CLJ 643 dirujuk. G

(4) Bukti melangkaui keraguan munasabah ialah bukti yang menyebabkan mahkamah dengan yakin mempercayai mengenai kebersalahan tertuduh. Walau bagaimanapun, ia bukanlah bukti dengan kepastian mutlak. Bukti melangkaui keraguan munasabah tidak bermaksud bukti H di luar bayangan keraguan. Walaupun manfaat setiap keraguan munasabah perlu diberikan kepada tertuduh dan tidak boleh ditahan daripadanya, pada masa yang sama, mahkamah tidak boleh melayannya atas alasan-alasan yang bersifat khayalan ataupun spekulasi. Undang-undang tidak memerlukan bukti yang mengatasi setiap I keraguan yang ada (lihat perenggan 24); *Public Prosecutor v Saimin & Ors* [1971] 2 MLJ 16 dirujuk; *Sabarudin bin Non & Ors v Public Prosecutor* [2005] 4 MLJ 37 dirujuk; *Pang Chee Meng v Public Prosecutor* [1992] 1 MLJ 137 dirujuk; *Public Prosecutor v Datuk Haji Harun bin Haji Idris & Ors* [1977] 1 MLJ 180 dirujuk.

(5) Penafian semata-mata atau mengemukakan cerita kosong ketidakbersalahan seperti di dalam keadaan kes ini, bukanlah keraguan munasabah. Penerimaan mahkamah terhadap penerangan yang diberikan oleh tertuduh mestilah berdasarkan alasan dan akal, dan tidak boleh menjadi tidak logik atau tidak rasional. Kewujudan keraguan munasabah bergantung kepada keseluruhan keterangan dan atas pemeriksaan kesemua keterangan secara adil dan munasabah dan bukannya secara berasingan. Dalam kes ini, perayu gagal untuk menimbulkan sebarang keraguan munasabah ke atas kes pendakwaan dan pertuduhan dibuktikan melangkaui keraguan munasabah (lihat perenggan 25).]

Notes

For cases on s 302 of the Penal Code, see 4(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 1815–1931.

For cases on standard of proof, see 7(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 823–836.

Cases referred to

Chan Chwen Kong v PP [1962] MLJ 307, CA (refd)
Idris v PP [1960] MLJ 296, CA (refd)
Krishna Rao a/l Gurumurthi & Anor v PP & another appeal [2007] 4 CLJ 643, CA (refd)
Miller v Minister of Pensions [1947] 2 All ER 372, KBD (refd)
Pang Chee Meng v PP [1992] 1 MLJ 137, SC (refd)
PP v Datuk Haji Harun bin Haji Idris & Ors [1977] 1 MLJ 180 (refd)
PP v Saimin & Ors [1971] 2 MLJ 16 (refd)
Sabarudin bin Non & Ors v PP [2005] 4 MLJ 37, CA (refd)
Tai Chai Keh v PP [1948–1949] Supp MLJ 105, CA (refd)

Legislation referred to

Criminal Procedure Code s 180(3)
Penal Code s 302

Appeal From: Criminal Trial No 45–13 of 2010 (High Court, Seremban)

Hisham Teh Poh Teik (Teh Poh Teik & Co) for the appellant.
Kwan Li Sa (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Azahar Mohamed JCA:

[1] Ali Tan bin Abdullah, the appellant herein was charged in the High Court of Seremban for committing murder of Nor Liza bt Ishak ('first charge'),

punishable under s 302 of the Penal Code. He was also charged with murdering Amirul Ayman ('second charge'), the child of Nor Liza bt Ishak, at the same time and place. The charges read as follows:

> First charge
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> Bahawa kamu pada tarikh 02.09.2010 jam lebih kurang 3.15 petang hingga tarikh 03.09.2010 jam lebih kurang 10.15 pagi, di rumah no. B5-1-09B, Flat Win Min, Pasar Baru, di dalam Daerah Port Dickson, di dalam Negeri Sembilan, didapati dengan sengaja menyebabkan kematian ke atas penama Nor Liza bte Ishak, KPT: 750519-03-5828, oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah section 302 Kanun Keseksaan.
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> Second charge
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> Bahawa kamu pada tarikh 02.09.2010 jam lebih kurang 3.15 petang hingga tarikh 03.09.2010 jam lebih kurang 10.15 pagi, di rumah no. B5-1-09B, Flat Win Min, Pasar Baru, di dalam Daerah Port Dickson, di dalam Negeri Sembilan, didapati dengan sengaja menyebabkan kematian ke atas penama Amirul Ayman bin Mohd Yusoff, No Sijil Kelahiran: 087920, oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah section 302 Kanun Keseksaan.

[2] At the conclusion of the trial, the learned judicial commissioner ('JC') found that each of the charges had been proven beyond reasonable doubt against the appellant. The learned JC convicted the appellant on the two charges of murder and sentenced him to the mandatory death penalty prescribed by the Penal Code. Aggrieved by that decision, the appellant then appealed to this court. We heard his appeal, wherein at its conclusion we unanimously dismissed it. We affirmed the convictions and sentences. We now give our reasons for so deciding.

[3] The facts adduced by the prosecution at the trial in the High Court had been fully and well set out in the judgment of the learned JC (see pp 126–142 of Vol 1 of the appeal record). Here, we will only highlight in the following paragraphs, very briefly, the pertinent facts in so far as they are relevant to the issues which arise for decision in this appeal before us.

[4] In this case, the prosecution relied on circumstantial evidence to prove its case against the appellant. There is no eye witness to these crimes. According to the charges, the murder of the mother and her child was alleged to have been committed by the appellant between 3.15pm on 2 September 2010 and 10.15am on 3 September 2010, at apartment No B5-1-09B, Flat Win Min, Pasar Baru, in the District of Port Dickson, in the State of Negeri Sembilan. At all material times, Nor Liza bt Ishak (the first victim) and her child (the second victim) resided at this rented apartment. It is also an important point to note in this case that the appellant was the victims' immediate neighbour.

[5] The investigation into this case commenced with the discovery of both victims lying motionless in the bathroom of their rented apartment on the morning of 3 September 2010 by Siti Suriati bt Zulkapli ('PW11'). The first victim's left hand and legs were bound with cable tie, her mouth was sealed with masking tape, her face was covered with a white plastic bag and on top of that, a wet 'kain sarung' was covering her whole face. The second victim's right hand and legs were also bound with cable tie, his mouth was similarly sealed with masking tape and his face was covered with a wet t-shirt. The post-mortem carried out by the pathologist, Dr Sharifah Safoorah bt Syed Alwee Al'Aidrus ('PW8') found several external marks of trauma, predominantly on the head of the first victim. PW8 also observed some apparent defensive wounds on the first victim's face and upper torso. PW8 certified the cause of death of both the victims as a result of suffocation. For the first victim, the masking tape covering the mouth and the plastic bag and the wet 'kain sarung' which covered her entire face had occluded air from entering the air passages. The same applied to the second victim when the wet t-shirt and masking tape covering the victim's mouth had rendered him unable to breathe.

[6] As we have said earlier, the appellant was the victims' immediate neighbour at their rented apartment. The prosecution contended that the appellant took flight immediately after the incident on 2 September 2010 and went into hiding after staying a night at Sunshine Hotel Port Dickson.

[7] On the following day, the appellant went to a computer repair shop operated by Wong Few Kiat ('PW15'). The appellant was carrying a sling bag which contained several items, among others, a Dell laptop (P13). The appellant requested for P13 to be reformatted. Beside P13, there were three Nokia handphones (P14, P15, P16), two adaptors (P23A and P23B) and a Sony PSP (P19) inside the sling bag.

[8] Also on the following day, as testified by Chin Lai Kwee ('PW16') the owner of Pajak Gadai Kwang Tung Kee Port Dickson, the appellant went to PW16's pawn shop to pawn several items, namely a necklace (P18A), a pendant (P18B), two bangles (P17A and P17B) and a pair of earrings. According to PW16, the appellant had pawned P18A, P18B, P17A and P17B for a sum of RM2,200.

[9] In the course of police investigations, Encik Mohd Yusof bin Awang Besar ('PW21'), the husband of the first victim confirmed that all those items, namely the laptop, the three Nokia handphones, the PSP Sony, the two adaptors and the jewelleries belonged to the first victim.

[10] Subsequently, the appellant was arrested on 5 September 2010. Soon after his arrest, the appellant gave information to ASP Poi Chong Lai ('PW18').

After that, the appellant led PW18 to a spot along Jalan Tenggiri, Taman Desa Permai, Port Dickson where he had thrown away the three sim cards for the Nokia phones. Norazlin bt Ahmad ('PW19'), an officer from Celcom Telecommunication Company confirmed that two of the sim cards were registered under the first victim's name.

[11] In the course of the trial before the learned JC, the prosecution sought to prove that a mixed DNA profile developed from a cable tie bearing stains indicative of blood marked 'R5', a cable tie bearing stains indicative of blood marked 'R6' and from masking tape bearing stains indicative of blood marked R12 (b) revealed that they were contributed by the first victim's and the appellant's DNA profiles. According to the prosecution, the forensic evidence comprising the presence of the appellant's DNA profile provides cogent evidence to incriminate the appellant in the commission of both the offences.

[12] The above is a summary of the evidence presented by the prosecution during the trial. On the basis of the evidence mentioned above, after the conclusion of the case for the prosecution, the learned JC came to the finding that the prosecution had made out a prima facie case against the appellant under s 180(3) of the Criminal Procedure Code and therefore called upon the appellant to enter on his defence in respect of the offences charged.

[13] Before dealing with specific issues which arise for decision, there is one matter, which at the outset requires to be kept in mind. As we shall see later, this matter turned out to be the main ground upon which the convictions of the appellant had been attacked by the appellant in support of his appeal. It is this. At the close of the case for the prosecution, the learned trial judge admitted the DNA evidence of the appellant found at the scene of the crime and this was one of the reasons why the learned JC ruled that a prima facie case had been proven. This can be seen at para 53 of the judgment of the learned JC as follows:

> Mahkamah membuat satu inference bahawa kematian kedua-dua si mati dapat dikaitkan dengan perbuatan OKT apabila terdapat kesan darah OKT pada ekshs P40A, P55A dan P83.

[14] In para 63 of his judgment, the learned JC further said:

> Selain itu keterangan ikut keadaan yang kuat dengan penemuan darah OKT pada *cable tie* R6 (P40) *masking tape* R12 (A) (P55A) dan *cable tie* R26 (P83) yang digunakan mengikat kedua-dua si mati telah membolehkan satu inferen dibuat bahawa OKT berada di tempat kejadian pada masa material.

[15] However, at the conclusion of the trial, upon hearing further submissions by learned counsel for the appellant and the learned deputy public

prosecutor ('DPP') on the issue of the admissibility of the blood sample of the appellant (P96), the learned JC at paras 70–76 of his judgment reviewed his earlier ruling on the DNA. The learned JC then ruled the DNA evidence as inadmissible. In the words of the learned JC:

> Berbalik kepada isu penerimaan masuk keterangan DNA profile OKT dan specimen darah OKT (P96) adalah didapati ianya bertentangan dengan prinsip undang-undang keterangan yang asas. Oleh itu mahkamah menggunapakai s 422 KPJ untuk menyemak semula keputusannya dan memutuskan bahawa keterangan DNA profile dan specimen darah (P96) mengenai OKT adalah 'inadmissible and hearsay'. Walaupun tanpa specimen darah (P96) dan DNA profiling OKT, mahkamah masih berpuashati bahawa berlandaskan keterangan ikut keadaan, penemuan barang-barang kepunyaan si mati Norliza dalam milikan OKT serta tingkah laku OKT selepas kejadian yang mengundang pemakaian ss 8 dan 9 Akta Keterangan 1950 amat memadai untuk mewujudkan satu kes prima facie terhadap OKT bagi kedua-dua pertuduhan yang dihadapkan kepadanya.

[16] It is against the backdrop of the above, Encik Hisyam Teh Poh Teik, learned counsel for the appellant had argued before us that the learned JC misdirected himself when he failed to recognise that with the DNA evidence ruled as inadmissible there is insufficient evidence to sustain the murder convictions and therefore the convictions recorded against the appellant are not safe and ought to be set aside.

[17] After giving our utmost and anxious consideration, we do not agree and we dismissed the arguments for the following reasons. In our judgment, even without the DNA evidence, there were a number of pieces of evidence that incriminated the appellant in the commission of the offences. Before us, Puan Kwan Li Sa, the learned DPP had with care took us through these several pieces of evidence. Apart from the fact that the appellant went into hiding at Sunshine Hotel, what is more glaring was the evidence that the appellant had pawned the first victim's personal belongings and subsequently, sent the victim's laptop for reformatting. On top of that, is the evidence of the recovery of the first victim's handphone sim cards from a place along the road as a result of the appellant's information. We are in agreement with the learned DPP that all this admissible circumstantial evidence when taken together, irresistibly and unmistakably lead to the conclusion that the appellant committed the gruesome killings. As the Court of Appeal said in *Idris v Public Prosecutor* [1960] MLJ 296, circumstantial evidence should be such that when you look at all the surrounding circumstances, you find such a series of undesigned, unexpected coincidences that, as a reasonable person, you find your judgment is compelled to one conclusion. The Court of Appeal further said that if the circumstantial evidence is such as to fall short of that standard, if it does not satisfy that test, if it leaves gaps then it is of no use at all. It must, however, be borne in mind that in a case like this where the evidence is wholly circumstantial what has to be

considered is not only the strength of each individual strand of evidence but also the combined strength of these strands which go to make a rope. The real question is: is that rope strong enough to hang the prisoner? (per Thomson CJ in *Chan Chwen Kong v Public Prosecutor* [1962] MLJ 307).

[18] The general principle of law is that evidence pertaining to the recovery of articles belonging to the victim from the accused, soon after the murder of the victim, is undoubtedly one of the circumstances which can be considered by a court in finding that the accused has committed the offence of murder. This was explained by Gopal Sri Ram JCA (as His Lordship then was) in *Krishna Rao a/l Gurumurthi & Anor v Public Prosecutor & another appeal* [2007] 4 CLJ 643, at pp 668–669. This is what His Lordship said with regard to this matter:

> It is settled by authority that in a case where murder and robbery or theft form an integral part of a transaction, the recent and unexplained possession of the stolen property as in the present instance is evidence from which a court may draw the inference that the accused not only committed theft but also murder. Thus, in *Emperor v Neamaulla* 17 CWN 1077 Jenkins CJ, referred to s 114 of the Indian Evidence Act and quoted the following passage from *Wills on Circumstantial Evidence* (7th Ed):
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> > … the possession of stolen goods recently after the loss of them, may be indicative not merely of the offence of larceny, or of receiving with guilty knowledge, but of any other more aggravated crime which has to be connected with theft. This particular fact of presumption commonly forms also a material element of evidence in cases of murder; which special application of it has often been emphatically recognized.
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> In *Re Sogaimuthu Padayachi* AIR 1926 Mad 638 (a case cited by the learned judge) Spencer J observed as follows:
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> > When the charge is that the accused committed murder or theft in a building or both, is it legitimate to presume that the accused are guilty of the more serious offence of murder because they are unable or unwilling to explain their possession of stolen property? I think the answer must be that if there is other evidence to connect the accused with the death of the murdered man, a jury, or in this country a judge, may find upon circumstantial evidence that he is the murderer. But when the unexplained possession of stolen property is the only circumstance appearing in the evidence against an accused charged with murder and theft, the accused cannot be convicted of murder unless the court is satisfied that possession of the property could not have been transferred from the deceased to the accused except by the former being murdered.
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> More recently, in *Ganesh Lai v State of Rajasthan* [2002] Cr LJ 967, Lahoti J (later CJ) when delivering the judgment of the Supreme Court said:

Recovery of stolen property from the possession of an accused enables a presumption as to commission of offence other than theft or dacoity (that is to say, robbery under the Malaysian Penal Code) being drawn against the accused so as to hold him a perpetrator of such other offences on the following tests being satisfied: (i) The offence of criminal misappropriation, theft or dacoity relating to the articles recovered from the possession of the accused and such other offences can reasonably be held to have been committed as an integral part of the same transaction; (ii) the time-lag between the date of commission of the offence and the date of recovery of articles from the accused is not so wide as to snap the link between recovery and commission of the offence; (iii) availability of some piece of incriminating evidence or circumstance, other than mere recovery of the articles, connecting the accused with such other offence; (iv) caution on the part of the court to see that suspicion, howsoever strong, does not take the place of proof. In such cases the explanation offered by the accused for his possession of the stolen property assumes significance.

When the case rests on circumstantial evidence the failure of the accused to offer any satisfactory explanation for his possession of the stolen property though not an incriminating circumstance by itself would yet enable an inference being raised against him because the fact being in the exclusive knowledge of the accused it was for him to have offered an explanation (see *Earabhadrappa v State of Karnataka* AIR 1983 SC 446; *Gulab Chand v State of Madhya Pradesh* AIR 1995 SC 1598) …

[19] This then brings us to the defence of the appellant. The appellant was the only witness in his own defence. On being called to make his defence, the appellant elected to make an unsworn statement from the dock. In his unsworn statement, the appellant denied he murdered the victims but he admitted that on that fateful day he had entered the victims' apartment and later he left the apartment after taking a laptop, a PSP, three handphones and the jewelleries. His entire unsworn statement reads as follows:

(1) Pada 2.9.2010, jam lebih kurang 11 pagi saya bangun daripada tidur di pangsapuri yang saya sewa iaitu No. B5-1-09A, Flat Win Min, Pasar Baru Port Dickson, Negeri Sembilan.

(2) Selepas bangun lebih kurang jam 3 petang saya keluar pangsapuri saya hendak pergi makan.

(3) Apabila keluar, saya telah pun masuk ke rumah jiran saya iaitu No. B5-1-09B, Flat Win Min, Pasar Baru, Port Dickson, Negeri Sembilan.

(4) Saya masuk ke situ dan telah ambil beberapa barang berharga iaitu laptop, PSP, 3 handphone dan barang kemas.

(5) Selepas itu, saya terus keluar daripada rumah itu dan melarikan diri.

(6) Saya tidak mengaku membunuh sesiapa dalam rumah tersebut.

(7) Pada malam 4.9.2010 saya ditangkap polis di rumah bapa saya No. 24, Taman Sri Mawar, Kampung Ayer Meleleh, Port Dickson.

(8) Pada 5.9.2010 jam lebih kurang 2 petang saya ada dihantar ke hospital.

(9) Seingat saya, saya pergi ke hospital dibawa anggota polis. I.O. kes iaitu Tuan ASP Mohd Razian bin Abdul Razak tidak ikut kami.

(10) Saya tidak mengaku bahawa darah saya diambil daripada saya atau dengan persetujuan saya untuk pemeriksaan DNA.

(11) Sepanjang bicara, tiada saksi dipanggil yang kata darah saya diambil atau pun diambil dengan persetujuan saya untuk DNA.

(12) Oleh itu, saya langsung tidak dapat peluang untuk cabar mereka, mereka yang dikatakan mengambil darah saya, yang mana saya tidak mengakui atau mendapat persetujuan saya untuk ambil darah saya untuk ujian DNA.

(13) Saya tidak mengakui kepada tuduhan bunuh ini.

(14) Saya pohon dilepaskan dan dibebaskan.

[20] In para 80 of his judgment, the learned JC had dealt at some length with the explanation rendered by the appellant regarding his possession of the stolen personal belongings of the first victim. The learned JC had directed and addressed his mind to this critical issue. Even more, the learned JC had made clear and specific findings of fact on the issue. In para 80 of his judgment, this is what the learned JC said:

> Perlakuan ('conduct') OKT bermalam di Sunshine Hotel PD pada malam hari kejadian sedangkan OKT mempunyai apartment yang disewanya serta perlakuan OKT menformat semula laptop dan menggadai barang kemas serta memandu arah polis sehingga terjumpanya semula sim card yang dibuang oleh OKT, harus dijelaskan oleh OKT semasa pembelaannya. Perlakuan-perlakuan ini pada pandangan mahkamah adalah satu keterangan yang relevan dan boleh diterima masuk di bawah s 8 Akta Keterangan 1950. Aspek keterangan ini adalah berkait secara langsung dengan 'fact in issue' iaitu sama ada OKT telah melakukan pembunuhan terhadap si mati Norliza dan si mati Amirul seperti pertuduhan.

Further down in his judgment, the learned JC added:

> OKT langsung tidak memberi penjelasan mengenai perlakuan ('conduct') seperti yang dikehendaki oleh s 9 Akta Keterangan 1950. Perlakuan ini pada pandangan mahkamah telah menghapuskan anggapan ketidakbersalahan OKT.

[21] In para 82 of his judgment, the learned JC arrived at the following conclusions, after a careful and thorough analysis of the entire evidence and case law authorities:

> Berdasarkan semua keterangan ikut keadaan yang terdapat dalam kes ini, adalah munasabah untuk diputuskan bahawa OKT adalah orang yang bertanggungjawab melakukan pembunuhan tersebut. Dalam kes *Public Prosecutor v Lee Ah Hua* [1989]

1 MLJ 120 Hakim Abdul Malik Ishak (sebagaimana dia ketika itu) berkata 'a mere denial through a statement from the dock had not raised any doubt on the prosecution case'.

Oleh itu di akhir kes pembelaan adalah menjadi penemuan spesifik mahkamah bahawa pihak pendakwaan telah berjaya membuktikan kesnya tanpa keraguan yang munasabah terhadap OKT dan selaras dengan s 182A(1) KPJ mahkamah mendapati OKT bersalah dan disabitkan dengan kedua-dua pertuduhan tersebut.

[22] The learned JC had meticulously considered the defence of the appellant. He took special care to consider and judicially appreciate the explanation of the appellant at some length before coming to a definite finding of fact. Nothing more may fairly be expected of the learned JC on this issue. Having considered the entire evidence in the appeal records, we agree with the findings of the learned JC. The judgment does not contain any error warranting appellate interference. In arriving at his finding, the learned JC had taken into account all the relevant considerations without misdirecting himself.

[23] In our judgment, the totality of the evidence and the prevailing surrounding circumstances when taken together irresistibly point to the fact that the possession of the personal belongings of the first victim could not have been transferred from the first victim to the appellant except after both the victims were murdered by the appellant. The entire evidence presented by the prosecution against the appellant was compelling. The fact of recovery of articles belonging to the first victim, the nature of the articles, the manner in which the articles were dealt with by the appellant, the circumstances of the recovery of the articles, the length of time after which such discovery of the articles was effected, the admission of the appellant that he had entered the victims' apartment and the injuries suffered by the victims; all taken cumulatively and considered together form a chain so complete in pointing towards the guilt of the appellant and no one else. It is true that if two views are possible on the evidence adduced in a case, one pointing to the guilt of the accused and the other to his innocence, the view which is favorable and beneficial to the accused should be adopted (see *Tai Chai Keh v Public Prosecutor* [1948–1949] Supp MLJ 105). This is certainly not the case here. In our judgment, this is a case where murder and theft committed by the appellant have been proved beyond a reasonable doubt to form part of one and the same transaction.

[24] In our judgment, on the facts of the present case, the learned JC was entitled and correct in holding that the unsworn statement of the appellant was incapable of raising a reasonable doubt on the prosecution's case. It is true that an accused person has no burden to prove his innocence. The cardinal principle in our administration of criminal justice system is that the prosecution must

prove the guilt of the accused beyond reasonable doubt. This refers to the standard of proof which must be satisfied by the prosecution before a court finds the accused guilty. Proof beyond a reasonable doubt is proof that leaves the court firmly convinced of the accused's guilt. However, it is not proof with absolute certainty (see *Pang Chee Meng v Public Prosecutor* [1992] 1 MLJ 137). Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt (see *Miller v Minister of Pensions* [1947] 2 All ER 372). Even though the benefit of every reasonable doubt must be given to the accused and cannot be withheld from him, court must not, on the other hand, entertain it on grounds which are fanciful or in the nature of speculation (see *Public Prosecutor v Saimin & Ors* [1971] 2 MLJ 16 and *Sabarudin bin Non & Ors v Public Prosecutor* [2005] 4 MLJ 37). The law does not require proof that overcomes every possible doubt. Abdoolcader J (as His Lordship then was) in *Public Prosecutor v Datuk Haji Harun bin Haji Idris & Ors* [1977] 1 MLJ 180 at p 216 explained the phrase in the following words:

> It is not necessary for the defence to prove anything and all that is necessary for the accused to do is to give an explanation that is reasonable and throws a reasonable doubt on the case made out for the prosecution. It cannot be a fanciful or whimsical or imaginary doubt, and in considering the question as to whether a reasonable doubt has been raised, the evidence adduced by and the case for the defence must be viewed in at least some amount of light, not necessarily bright sunlight, but certainly not against the dark shadows of the night.

[25] Indeed, mere denial or presenting a bare story of innocence, such as in the circumstances of the present case, cannot amount to reasonable doubt. The court's acceptance of the explanation offered by an accused person must be based upon reason and common sense, and cannot be illogical or irrational. The existence of reasonable doubt is dependent upon the totality of the evidence and on an examination of all the evidence in a fair and reasonable manner and not in isolation. In the present case, the learned JC in his judgment had very meticulously considered the defence of the appellant. The learned JC was satisfied that the appellant had failed to cast any reasonable doubt on the prosecution's case and that the charges were proved beyond reasonable doubt. We are in complete agreement with the learned JC. We are satisfied that the learned JC had not misdirected himself in any way to occasion an error either on the law or the facts to warrant appellate interference. We are unanimous that the learned JC had not made any wrong inferences on the facts before him. We found no merits in this appeal. We accordingly dismissed the appeal and affirmed the convictions and sentences on both the charges.

Appeal dismissed.

Reported by Kanesh Sundrum